


MEMORANDUM

TO: County Council

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: **Public Hearing/Action:** Expedited Bill 22-05, Building Permits – Moratorium –
Certain Areas

Summary Expedited Bill 22-05, Building Permits – Moratorium – Certain Areas, sponsored by Councilmembers Subin, Knapp, Floreen, and Denis, was introduced on July 18, 2005. A public hearing and action are scheduled for July 26. Bill 22-05 would restrict the issuance of building permits for construction¹ of any residential building for which a site plan is required, and require certain previously issued building permits to be held in abeyance, until either November 1 or, for each affected building, 15 days after the Council receives a joint report from the Planning Board Chair and the Director of the Department of Permitting Services (DPS) verifying that the building will be built as approved in the relevant project, development, and site plan. **The bill does not require any further action by the Council after this verification is received.** The purposes of the proposed 15-day waiting period, as Council staff understands them, are to inform the public that the Planning Department and DPS have found that each particular building will be built according to plan (which, in the case of a building permit that will be newly issued, an aggrieved party can appeal under County Code §8-23), and for the Council to monitor, in the aggregate, the review process the two agencies are using and, if necessary, take further legislative action.

As everyone knows, this bill is a legislative response to widespread violations of project and site plans at Clarksburg Town Center found by the Planning Board or alleged by citizens (see Council press release, ©9-12; County Executive letter, ©13-14), including questions about whether similar deviations may have taken place elsewhere in the County. Shortly after Bill 22-05 was introduced, the County Executive and Planning Board Chair jointly announced a more limited “freeze” on certain building permits (see press release, ©15-16). For questions about the situation and responses to it raised by Councilmembers, see ©29-30 (Council President Perez), ©31-32 (Planning, Housing, and Economic Development Committee Chair Silverman), ©33 (Councilmember Knapp), ©34 (Councilmember Praisner), and ©35-37 (Councilmember Knapp).

Comparison The primary differences between Bill 22-05, if enacted as introduced, and the Executive/Board action, are:

¹Council staff understands this term to mean new construction of a primary residential building, and *not* to include additions and renovations or accessory structures.

- The Executive “freeze” seems to apply to all types of buildings. Bill 22-05 only applies to residential buildings.
- The Executive “freeze” applies to buildings in “site plan zones”, which is not defined but could mean virtually all zones (see table from County zoning law, ©3-8). Bill 22-05 applies only to residential buildings for which a site plan is required under the zoning law, which excludes most single-family houses in existing neighborhoods.
- Bill 22-05 expires on the earlier of November 1 or when a building-by-building or site plan-by-site plan report is submitted to the Council. The Executive “freeze” seems to expire when all pending building permit applications have been reviewed.
- Bill 22-05 applies to buildings for which building permits have been issued but “construction has not actually started”, which staff understands to mean *placement of footings in the ground*. The Executive “freeze” does not apply to any building for which a building permit has been issued.
- Bill 22-05 requires compliance with all requirements of approved plans, and any other requirements of law, before a building permit can be issued. The Executive “freeze” appears only to cover height and setback requirements.

Legality The Office of the County Attorney reviewed this bill and does not believe it is unconstitutional (see memo, ©17-20). Council staff agrees with their analysis. Local land use attorneys, not surprisingly, differ (see Gordon et al letter, ©21-25). In our view the arguments against the bill in the Gordon letter (including comparisons to the current law’s procedures to issue stop work orders) are mainly policy arguments and do not present any substantial legal impediment to Council action on this bill.

Issues

1) **Title of provision** Although the bill and its operative provision are entitled in part “Moratorium”, the “escape clause” of proposed §1(b)(2) renders it less than a complete moratorium. In addition, Council staff has heard that the use of this term, regardless of the content, may have undesirable consequences in the real estate development business. Accordingly, Council staff **recommends** that the more precise term Building Permit Certifications of Compliance be substituted for Moratorium in the short title and on line 2.

2) **Findings** As already mentioned, the County Attorney (see memo, ©17-20), concluded that Bill 22-05 is constitutional and would not effect a taking of property, but recommended that the Council should clearly articulate a public purpose for this temporary moratorium and include that language in the bill itself. Council staff will distribute, as a supplementary packet before Council action, findings language that will fulfill this need, and **recommends** that, if this bill is enacted, the Council insert such language on line 2 and renumber the later sections.

3) **Geographic scope of provision** If Councilmembers believe that the situation in Clarksburg Town Center may be unique, and are not convinced that the same issue are presented County-wide in sufficient magnitude to warrant these building permit restrictions, Bill 22-05

could be amended to limit its effect to Clarksburg generally or the Clarksburg Town Center specifically. Council staff is not ready to say that these problems are limited to Clarksburg and does not recommend a geographic limit in the bill.

4) ***Types of buildings covered*** Bill 22-05 is limited to residential buildings, primarily because that is where the compliance issues have focused (although that may be an artifact of the residential nature of the early phases of the Town Center project). Although, like the Executive “freeze”, it could also cover commercial buildings, at this point we have not heard sufficient facts or allegations to justify that expansion of its scope.

5) ***Type of joint report*** Council staff is aware of possible amendments, discussed by bill sponsors and affected agencies, that would change the joint Planning Board/DPS report to the Council under §1(b)(2) of the bill from a series of building-by-building or site plan-by-site plan reports to a single report describing how the Board and DPS expect to verify the compliance of each affected building. Under this formulation, the moratorium would end when this initial report is filed with the Council, which could take place within several weeks. This amendment could be drafted as follows:

(b) This Act expires on the earlier of:

(1) November 1, 2005; or

(2) [[with respect to any residential building for which a site plan is required by Chapter 59, 15 days after]] when the Council receives a report, signed jointly by the Chair of the County Planning Board and the Director of the Department of Permitting Services, [[verifying]] describing the additional procedures, reviews, and staffing measures that the Board and Department have instituted to verify that plans for [[that]] each building conform to all applicable provisions of any approved project plan, subdivision plan, site plan, and building permit, and any other applicable requirement of Chapter 8, Chapter 50, and Chapter 59.

6) ***Waiting period*** If the Council does not modify the nature of the joint report as Issue 5 discusses, Councilmember Knapp, a sponsor of Bill 22-05, would delete the 15 - day waiting period (see Knapp memo, ©36). One rationale for this amendment, as Councilmember Knapp mentioned, is the availability of an appeal within 30 days from the issuance of any building permit, although construction can proceed at the applicant’s risk before and after an appeal is filed.

7) ***Building permit cross-check*** Attorney David Brown, representing the Clarksburg Town Center Advisory Committee (see ©26-28), proposed a permanent amendment to the County building permit law to require a certification of site plan compliance from the Planning Board before certain building permits are issued. While DPS is already required to check for site plan compliance under §8-26(g), this amendment would make the requirement more explicit. However, Council staff does not recommend enacting any permanent amendments in this temporary bill.

Expedited Bill No. 22-05
Concerning: Building Permits -
Moratorium - Certain Areas
Revised: 7-18-05 Draft No. 4
Introduced: July 18, 2005
Expires: January 18, 2007
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: November 1, 2005
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Subin, Knapp, Floreen, and Denis

AN EXPEDITED ACT to:

- (1) restrict the issuance of certain building permits during a certain period of time;
- (2) require the Department of Permitting Services to suspend, and issue a stop work order with respect to, certain previously issued building permits; and
- (3) generally amend County law governing the issuance and use of building permits.

By amending

Laws of Montgomery County 2005

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **The Laws of Montgomery County 2005 are amended as follows:**

2 **Sec. 1. Moratorium; expiration.**

3 (a) Notwithstanding any contrary provision of Chapter 8 or any other
4 County law:

5 (1) the Department of Permitting Services must not issue a building
6 permit for construction of any residential building for which a site
7 plan is required by Chapter 59; and

8 (2) the Department of Permitting Services must suspend, and must
9 immediately issue a stop work order with respect to, any building
10 permit previously issued for construction of any residential
11 building for which a site plan is required by Chapter 59 if
12 construction of that building has not actually started when this
13 Act takes effect.

14 (b) This Act expires on the earlier of:

15 (1) November 1, 2005; or

16 (2) with respect to any residential building for which a site plan is
17 required by Chapter 59, 15 days after the Council receives a
18 report, signed jointly by the Chair of the County Planning Board
19 and the Director of the Department of Permitting Services,
20 verifying that plans for that building conform to all applicable
21 provisions of any approved project plan, subdivision plan, site
22 plan, and building permit, and any other applicable requirement
23 of Chapter 8, Chapter 50, and Chapter 59.

24 **Sec. 2. Expedited Effective Date.**

25 The Council declares that this legislation is necessary for the immediate
26 protection of the public interest. This act takes effect on the date when it becomes
27 law.

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Art. 59-D

**ARTICLE 59-D. ZONING DISTRICTS—APPROVAL PROCEDURES.
INTRODUCTION.**

- (a) In certain zones, the developer must submit plans for approval, and development must be consistent with the approved plans. Article 59-C indicates under each zone which, if any, of these plans are required. These plans are of 4 kinds, as follows:
- (1) **Development plan.** *This is a plan submitted as a part of an application for the reclassification of land into the zone, and the approval of the application includes the approval of the plan. (See division 59-D-1.)*
 - (2) **Project plan for optional method of development.** *This type of plan applies in the 6 “CBD” zones, the RMX zones and the MXTC zone. It is similar to a development plan, except that it is not a requirement for the approval of a rezoning application but a precondition for the use of the optional method of development. (See Division 59-D-2.)*
 - (3) **Site plan.** *In all of the zones requiring either of the above types of plans and also in certain other zones, a site plan, showing more detail, is also required as a precondition for the issuance of building permits. (See division 59-D-3.)*
 - (4) **Diagrammatic plan.** *This type of plan applies only in the MXN zone, and must be submitted as part of an application for the reclassification of land into the zone, and the approval of the application includes the approval of the plan. (See division 59-D-4.)*
- (b) **Schematic development plan.** *In certain zones, a schematic development plan may be submitted as a part of the application for reclassification of the land, as provided in section 59-H-2.5, “Contents of Optional Method of Application—Local Map Amendments.” Procedures for certification, filing and amendment of schematic development plans approved by the district council are specified in division 59-D-1, below.*

The following table is provided for the convenience of the public, citing the appropriate sections of article 59-C and indicating the types of plans required in each zone. In the event of any conflict between this table and the provisions of article 59-C, the latter must govern.

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Article 59-D

Plan Approvals Required

Zone	Section Number	Development Plan (Division 59-D-1)	Project Plan Optional Method (Division 59-D-2)	Site Plan (Division 59-D-3)	Diagrammatic Plan (Division 59-D-4)
R-200	59-C-1.63			M	
R-150				M	
R-90				M	
R-60				M	
R-40				M	
R-T 6.0				X	
R-T 8.0				X	
R-T 10.0				X	
R-T 12.5				X	
R-T 15.0				X	
R-4 plex		X		X	
R-30				M	
R-20				M	
R-10				M	
R-H				X	
R-MH		X		X	
C-T				X	
O-M				X	
C-O				H	
C-P				X	
C-2				E	

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Art. 59-D

Article 59-D

Zone	Section Number	Development Plan (Division 59-D-1)	Project Plan Optional Method (Division 59-D-2)	Site Plan (Division 59-D-3)	Diagrammatic Plan (Division 59-D-4)
C-3				X	
C-4				O	
C-6				X	
H-M				X	
C-Inn		X		X	
I-1				H	
I-3				X	
I-4				O	
LSC				X	
R&D				O	
RS				X	
RNC				O	
LDRCDZ				X	
<i>Standard Method</i>					
- CBD-0.5				M	
- CBD-R1				M	
- CBD-R2				M	
- CBD-1				M	
- CBD-2				M	
- CBD-3				M	
- RE-2/TDR				M	
- RE-2C/TDR				M	

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Article 59-D

Zone	Section Number	Development Plan (Division 59-D-1)	Project Plan Optional Method (Division 59-D-2)	Site Plan (Division 59-D-3)	Diagrammatic Plan (Division 59-D-4)
<i>Standard Method</i>					
- RE-1/TDR				M	
- R-200/TDR				M	
- R-150/TDR				M	
- R-90/TDR				M	
- R-60/TDR				M	
- RMX-1				M	
- RMX-1/TDR				M	
- RMX-2				M	
- RMX-2/TDR				M	
- RMX-3				M	
MXTC	Sec. 59-C-11.3(a)			Optional method projects and certain standard method projects.	
<i>Optional Method</i>					
- RMX-3/TDR				M	
- CBD-0.5			X	X	
- CBD-R1			X	X	
- CBD-R2			X	X	
- CBD-1			X	X	

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Art. 59-D

Article 59-D

Zone	Section Number	Development Plan (Division 59-D-1)	Project Plan Optional Method (Division 59-D-2)	Site Plan (Division 59-D-3)	Diagrammatic Plan (Division 59-D-4)
- CBD-2			X	X	
- CBD-3			X	X	
- RE-2/TDR				X	
- RE-2C/TDR				X	
- RE-1/TDR				X	
<i>Optional Method</i>					
- R-200/TDR				X	
- R-150/TDR				X	
- R-90/TDR				X	
- R-60/TDR				X	
- RMX-1			X	X	
- RMX-1/TDR			X	X	
- RMX-2			X	X	
- RMX-2/TDR			X	X	
- RMX-2C			X	X	
- RMX-3			X	X	
- RMX-3/TDR			X	X	
- RMX-3C			X	X	
P-D	59-C-7.19	X		X	
MXN	59-C-7.79			X	X
MXPD		X		X	
Town Sector		X		X	

MONTGOMERY COUNTY CODE
ZONING ORDINANCE
Chapter 59

Article 59-D

Zone	Section Number	Development Plan (Division 59-D-1)	Project Plan Optional Method (Division 59-D-2)	Site Plan (Division 59-D-3)	Diagrammatic Plan (Division 59-D-4)
Planned Neighborhood		X		X	
P-R-C		X		X	
PCC		X		X	
TS-R		X		X	
TS-M		X		X	
M-R-Rec.		X		X	

X—Required.

M—Required only if optional regulations for MPDUs are used.

H—Required only if over 3 stories or 42 feet in height.

N—Required only if development exceeds FAR 0.25.

O—Required only for optional method of development.

E—Required only for additional height in accordance with subsection 59-C-4.351.

(Legislative History: Ord. No. 10-53, § 19; Ord. No. 11-7, § 1; Ord. No. 11-35, §§ 3, 4; Ord. No. 12-1, §1; Ord. No. 12-36, § 8; Ord. No. 12-44, § 2; Ord. No. 12-69, § 3; Ord. No. 12-79, § 6; Ord. No. 13-33, §2; Ord. No. 13-45, § 2; Ord. No. 13-50, § 3; Ord. No. 13-54, § 2; Ord. No. 13-70, §2; Ord. No. 13-94, §3[2]; Ord. No. 15-45 § 3.)

Editor's note—Ord. No. 11-7, § 1, designated the opening paragraph of this Introduction as subsection (a), with existing subsections (a)—(c) redesignated (1)—(3). The section also added a new subsection (b) but failed to give subsection designations to the remaining two paragraphs, which have been retained with no subsection designations. Section 2 amended a nonexistent § 59-D-1.63, "Approval by District Council." The amendment was actually to the final paragraph of this Introduction. Subsequently, § 1 of Ord. No. 11-22 also amended the final paragraph of this Introduction without, however, taking into account the amendment effected by Ord. No. 11-7, § 2. The provisions of both ordinances have been combined as they affect this Introduction.



Montgomery County Council

For Immediate Release

July 12, 2005

Contact: Patrick Lacefield 240-777-7939 or Jean Arthur 240-777-7934

COUNCIL LAUNCHES INDEPENDENT FACT-FINDING REVIEW OF CLARKSBURG TOWN CENTER DEVELOPMENT

OLO Review First Step in Look at Whole County Development Process

The County Council today announced a series of actions designed to review County development processes, starting with an assignment to the Office of Legislative Oversight (OLO) to undertake an independent fact-finding review of the Clarksburg Town Center land use development approval, implementation, and enforcement process.

OLO, the Council's equivalent to the federal Government Accountability Office (GAO), will carry out the first phase of a multi-phased effort that the Council will undertake in order to better understand the issues surrounding Clarksburg Town Center development, and to provide policy guidance and recommendations for all government and private participants in the County's overall land development process.

In addition to the OLO review, the Council has asked the Montgomery County Planning Board and the County Department of Permitting Services to immediately begin a review of site plans approved within the last two years to ensure that work being done is in accordance with the specifications of the approved plans. The Council expects to receive an initial report within 60 days. In addition, the Planning Board has agreed to forward to the Council within two weeks an assessment of the increased staffing necessary to adequately review and regulate present and future site plans, and all site plans now pending will receive heightened scrutiny.

"All Montgomery County residents—including present and future Clarksburg families—deserve to be confident that the Town Center is laid out and built according to the Clarksburg Master Plan and each specific project approval," said Council President Tom Perez.

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"Clarksburg will be the last large 'new town' in Montgomery County, and the Council, with active participation by the development and civic communities, invested much time and thought in that master plan so that all of Clarksburg will reflect the best of current planning. The serious implementation issues uncovered thus far -- mainly due to diligent research and vigorous questioning by Clarksburg residents -- call public confidence into question about Clarksburg in particular and the whole development process in general.

"OLO is the right office to do this fact-finding because they are independent, knowledgeable, highly respected, and can do this job in a timely fashion. I expect we'll have this report ready by mid-September."

According to Perez, OLO will also stay in touch with the County's Inspector General, whose mandate is to investigate "fraud, waste, and abuse" in County government.

"I continue to be deeply concerned with the issues in Clarksburg, and I expect that OLO will provide the information necessary to allow the Council to take the appropriate corrective actions," said Mike Knapp, Councilmember for District 2, which includes Clarksburg.

The Council has requested a report from OLO that includes:

- A chronology of relevant events related to the development approval and implementation of Clarksburg Town Center;
- A description of how the development approval and implementation process is intended to work, and how it actually has worked to date in Clarksburg Town Center;
- Identification of inconsistencies, flawed processes, lack of coordination, or other problems that occurred in the development approval and implementation of Clarksburg Town Center; and
- A list of further questions that the Council should seek answers to and recommended next steps the Council should take concerning the issues raised by this fact-finding.

"OLO's fact-finding review will proceed independent of the adjudicatory processes that are currently underway at the Planning Board regarding specific violations that have occurred in the Clarksburg Town Center development process," said Perez. "After we receive OLO's findings in September, the
(more...)"

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Council will take whatever next steps are necessary to restore the public's trust in the County's land use policies and procedures."

"This OLO review is consistent with the type of review previously proposed by Planning staff," said Derick Berlage, chair of the Montgomery County Planning Board. "We believe that this OLO review can help move the ball forward and assist us in figuring out what went wrong and why."

"We will not limit our focus to Clarksburg," said Perez. "We intend to look at the entire land use development review and implementation process in the County. The information we get will help us begin the process of determining whether the issues uncovered in Clarksburg exist elsewhere."

"The unfolding of a new community in Clarksburg is too important to our County's future to be compromised in any way by process flaws and lack of coordination on the ground," said Perez. "Much remains to be done there, and we must all do all we can to make sure it gets done right -- in Clarksburg and in the County as a whole."

###

Attached find the text of Council President Tom Perez's memo to the Office of Legislative Oversight.

MEMORANDUM

July 12, 2005

TO: Karen Orlansky, Director
Office of Legislative Oversight

FROM: Thomas E. Perez, Council President

SUBJECT: **Independent Fact-finding Review of the Clarksburg Town Center
Development Approval and Implementation Process**

This memo serves as the County Council's formal request that the Office of Legislative Oversight (OLO) undertake an independent fact-finding review of the Clarksburg Town Center land use development approval and implementation process. OLO's fact-finding review will be one of multiple efforts that the Council will undertake in order to better understand the issues surrounding Clarksburg Town Center, and to

provide policy guidance and recommendations for all government and private participants in the County's overall land development process.

All Montgomery County residents -- including present and future Clarksburg families -- deserve to be confident that the Town Center is laid out and built according to the Clarksburg Master Plan and each specific project approval. Clarksburg will be the last large "new town" in Montgomery County, and the Council, with active participation by the development and civic communities, invested much time and thought in that master plan so that all of Clarksburg will reflect the best of current planning. The serious implementation issues uncovered thus far -- mainly due to diligent research and vigorous questioning by Clarksburg residents -- call that confidence into question.

In terms of fact-finding, the Council asks that you conduct a review of documents, supplemented with interviews as you deem appropriate, in order to develop a written report that includes:

- A chronology of relevant events related to the development approval and implementation of Clarksburg Town Center;
- A description of how the development approval and implementation process is intended to work, and how it actually has worked to date in Clarksburg Town Center;
- Identification of inconsistencies, flawed processes, lack of coordination, or other problems that occurred in the development approval and implementation of Clarksburg Town Center; and
- A list of further questions that the Council should seek answers to and recommended next steps the Council should take concerning the issues raised by your fact-finding.

Planning Board Chairman Derick Berlage and County Government Chief Administrative Officer Bruce Romer have agreed to lend the full cooperation of their respective agencies to this fact-finding review. We would like to receive your report by mid-September. Please keep me informed of the status of your work and let me know if you find that additional time is needed.

The Council understands that adding this additional assignment to OLO's Work Program will affect the target dates of completion for other projects. I recommend that you provide the Council with a revised FY06 Work Program production schedule shortly after you complete this fact-finding review.

c: Derick Berlage, Chairman, Montgomery County Planning Board
Bruce Romer, Chief Administrative Officer, Montgomery County Government



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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

July 12, 2005

016200

The Honorable Thomas E. Perez
President, Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

The Honorable Derick Berlage
Chairman, Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Dear Tom and Derick:

The recent revelation that developers in Clarksburg violated height and setback restrictions was a serious abuse of the public trust, one that highlights shortcomings in the current development review process and one that calls for serious sanctions. I am writing to urge that harsh, significant and meaningful penalties be assessed in this case and to ask for your support in an effort to increase and expand zoning enforcement staff through a hike in developer permitting fees.

I applaud the plan to conduct an Office of Legislative Oversight review of the Clarksburg matter, and pledge the Executive Branch's full support and cooperation. It is important that we have a better understanding of exactly what went wrong and how we can make improvements for the future. In the meantime, I believe we should begin to immediately address this matter by increasing the number of zoning enforcement officials working in both Park and Planning and the Department of Permitting Services. In my opinion, the costs of this increase should not come at taxpayer expense, but should be paid by those who benefit most from these development projects – the developers themselves. In addition, I would ask the Council and Planning board to place a moratorium on the creation of new "floating zones" until we are satisfied that sufficient accountability measures and resources are in place to properly enforce these non-traditional zoning requirements.

We must also address the current fire and rescue service needs of the Clarksburg community, as we have discussed over the past few months. While a permanent fire station is planned for Clarksburg in the future, the public safety needs of this community are more immediate.

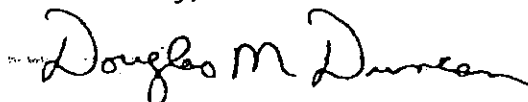


www.montgomerycountymd.gov

The Honorable Tom Perez
The Honorable Derick Berlage
July 12, 2005
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I look forward to working with each of you, Councilmember Knapp, community members and other stakeholders on these important issues. The Clarksburg situation should not be looked at in isolation, but rather should serve as a strong indicator that more needs to be done to ensure that our zoning laws and policies are strictly adhered to.

Sincerely,

A handwritten signature in black ink that reads "Douglas M. Duncan". The signature is written in a cursive style with a large, stylized "D" at the beginning.

Douglas M. Duncan
County Executive

The Maryland-National Capital Park and Planning Commission

Nr071805

For immediate release:

July 18, 2005

For more information, contact:

Sue Tucker, 240/777-6530

Nancy C. Lineman, 301/495-4600

**DUNCAN, BERLAGE ANNOUNCE FREEZE ON BUILDING PERMITS IN SITE
PLAN ZONES; IMPROVEMENTS FOR DEVELOPMENT REVIEWS AND
INSPECTIONS**

Montgomery County Executive Douglas M. Duncan and Montgomery County Planning Board Chairman Derick Berlage today announced a freeze on the issuance of building permits in site plan zones until height limitation and setback requirements can be verified on a host of outstanding development projects. Duncan and Berlage also announced a plan to improve the site plan review and inspection process to ensure that developers are complying with site plan agreements in so-called optional method zones in the County. This improved accountability plan will require the hiring of additional zoning enforcement staff, paid for through a hike in developer permit application fees.

"The revelation that developers in Clarksburg violated height and setback restrictions was a serious abuse of the public trust, one that highlights some shortcomings in the current development review process," said Duncan. "The steps we are taking will address these shortcomings and ensure that developers are complying with zoning restrictions."

Currently, more than 190 building permit applications are pending with the Department of Permitting Services (DPS). Applicants are being notified that their permits will not be issued until they resubmit site plans that disclose height and setback calculations. Before issuing permits, DPS and Park and Planning will verify setback and height restrictions spelled out in the site plan approvals.

Beginning immediately, developers will be required to provide, as part of their permit application to DPS, clear evidence of compliance with height restrictions on any site plan approved by the Planning Board. Planning Board staff will review the evidence of height and setback compliance on site plans as part of the agency's development review process.

"We're taking initial steps that we know will make a huge difference," said Berlage. "The goal is to put better systems in place to ensure developers comply with every letter of the law and our strict land use regulations."

Additional enforcement staff will be needed in DPS and Park and Planning to take on this increased oversight responsibility. Duncan said that the additional staff will be paid for by developers through an increase in permit fees.

DUNCAN-BERLAGE RELEASE
PAGE 2

"Increasing zoning enforcement staff is necessary, but should not come at the expense of taxpayers – it should be paid for by the developers who benefit most from these development projects," said Duncan.

Earlier this month, the Planning Board ruled that developers and builders constructed 433 townhouses too tall and 102 too close to streets. On July 28, the Board will consider sanctions against the builders and developers responsible for violating approved plans for the town center.

"We're taking a collaborative approach even before the Office of Legislative Oversight begins its review because these interim changes can certainly help in the meantime," said Berlage.

Park and Planning Director Charles Loehr also announced that he ended an internal practice that allowed mid-level planning staff to approve select administrative amendments to site plans. Now, only Loehr himself will issue such approvals.

The Planning Board and DPS will cooperate fully with OLO's review of the development issues related to Clarksburg Town Center. In addition, the Planning Board will issue a request for proposals to management consulting firms who specialize in process reviews. The Board will seek an independent, outside review of its development review division.

"The OLO review will be very helpful, but we know there will be an additional need to take a broader look at our internal processes," said Berlage. "We want to be ready to start that work just as soon as OLO has completed its work."

###



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

July 20, 2005

TO: Joseph Beach
Assistant Chief Administrative Officer

Robert Hubbard, Director
Department of Permitting Services

VIA: Marc Hansen, Chief *MPH*
General Counsel Division

FROM: Clifford L. Royalty *CLR*
Associate County Attorney

RE: *Bill 22-05, Building Permits - Moratorium - Certain Areas*

Bill 22-05 proposes an amendment to the County code that would prohibit the Department of Permitting Services ("DPS") from issuing a building permit for the "construction of any residential building for which a site plan is required . . ." and that would direct DPS to "suspend" and "issue a stop work order" as to any building permit issued for the "construction of any residential building for which a site plan is required . . . if construction of that building has not actually started" when the Bill becomes law. (Lines 5-12). The Bill "expires on the earlier of" a date certain: November 1, 2005 or, with respect to the aforementioned residential buildings, "15 days after the Council receives a report," signed by the Chair of the Planning Board and the Director of DPS, that verifies that the "plans" for the residential building "conform to" various County land use approvals and laws. (Lines 14-23).

Although titled "Moratorium; expiration," the Bill is not, strictly speaking, a moratorium, because it does allow residential building construction to proceed apace so long as the Council receives the aforementioned report. The Bill is better characterized as adding a layer of administrative review to certain building permit applications. Nevertheless, in the below legal discussion, we will treat the Bill as if it effects a moratorium.

Also, the Bill applies to "any residential building." The term "residential building" is undefined, though it is used in the building code. However, it is not to be found in the zoning ordinance. We will assume that the term, at a minimum, encompasses dwellings, as defined in the zoning ordinance.

Summary of Opinion

So long as the Bill furthers a valid public policy, it is legal.

Analysis

Legal challenges to the Bill are most likely to be mounted upon Article III, § 40 of the Maryland Constitution or the Fifth and Fourteenth Amendments to the United States Constitution. Article III, § 40, provides:

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

The federal analog to Article III, § 40, the Fifth Amendment, states:

No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment is “applicable to the states [and the County] through the Fourteenth Amendment.” *King v. State Roads Commission*, 298 Md. 80, 83, 467 A.2d 1032, 1034 (1983). Both the Fifth Amendment and Article III, § 40 “prohibit the taking of private property for public use without the payment of just compensation to the property owner.” *King*, 298 Md. at 83, 467 A.2d at 1033. Because the “decisions of the Supreme Court interpreting the Fifth Amendment’s just compensation clause are . . . practically direct authority” for the interpretation of Article III, § 40, we will treat them as one in this analysis. *King*, 298 Md. at 83-84, 467 A.2d at 1034.

The second clause of the Fifth Amendment is known as the takings clause. A claim under the takings clause invariably gives rise to a threshold question: What constitutes a taking? Government occupation or acquisition of private property provide easy examples of takings. But, as the courts have amply discussed, a physical occupation or acquisition is not a necessary prerequisite to a taking. See *Lingle v. Chevron*, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000 (2000). A government regulation may so encroach upon property rights to such a degree that the regulation effects a taking. This concept of a “regulatory taking” was first recognized by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) where the Court observed, unhelpfully, that a regulation that “goes too far” will be “recognized as a taking.” *Id.* at 415. The Bill, obviously, causes no physical occupation of private property. Thus, insofar as it burdens private property rights, the Bill would be challenged, and scrutinized, as a regulatory taking. See *Donohoe Construction Company v. Montgomery County Council*, 567 F.2d 603 (1977).

Whether the Bill would survive that scrutiny and, thus, avoid being deemed a taking for

which compensation is due, is primarily a function of the application of three Supreme Court cases, *Lucas*, 505 U.S. 1003 (1992), *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). We will begin with *Lucas*.

As clarified by subsequent Supreme Court decisions, *Lucas* held that “regulations that deprive an owner of ‘all economically beneficial use’ of her property” necessitates the payment of just compensation. *Lingle*, 125 S.Ct. at 2081, 161 L.Ed.2d at 887 (internal citations omitted). *Lucas* applies to “‘total’” regulatory takings; if the property owner has not suffered a 100% loss of property rights, a “complete elimination of a property’s value,” for example, then *Lucas* is inapplicable. *Lingle*, 125 S.Ct. at 2082, 161 L.Ed.2d at 888.

Where *Lucas* is inapplicable (and, obviously, where there has been no physical occupation of property), *Penn Central* likely applies. Under *Penn Central*, the courts weigh “a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Because a takings analysis often depends “upon the particular circumstances [in that] case,” *Penn Central*, 438 U.S. at 124, an evaluation of the Bill’s legal prospects is best informed by cases with analogous facts. Fortunately, there has been a fair amount of litigation over the validity of regulatory moratoria. See 30 *Pepp. L. Rev.* 273 (2003). A most recent example is *Tahoe*. *Tahoe* arose from two building moratoria, totaling 32 months, that prohibited new development in the Lake Tahoe Basin in order to protect the Lake from environmental degradation. The Supreme Court found that the moratoria did not effect a *per se* taking. The Court allowed that a temporary moratorium may effect a taking, but it does not do so categorically. *Tahoe*, 535 U.S. at 337. Notably, the Court recognized that the “consensus in the planning community” is that land use moratoria “are an essential tool of successful development.” *Id.* at 337-338.

Another instructive, and controlling, decision was rendered by the United States District Court for the District of Maryland in *Smoke Rise v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369 (D.Md. 1975). In *Smoke Rise*, the court addressed the legality of “various sewer hook-up moratoria” that were “in force in the several river basins of Prince George’s and Montgomery Counties.” *Id.* at 1372. The moratoria were enacted to prevent the further discharge of untreated sewage. The court upheld the moratoria under both the takings and the due process clauses of the Fifth Amendment. The court found no taking because the property owners could put their property to other, perhaps less profitable, use and because the moratoria were temporary. *Id.* at 1383. With respect to the due process challenge, the court found that the moratoria were an “exercise of the police power” which was “reasonable with regard to both purpose and duration.” *Id.* at 1390. In so concluding, the court “measured” the “reasonableness of the duration” of the moratoria “by the scope of the problem being addressed.” *Id.* at 1386. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

Though it precedes, by several decades, the Supreme Court's more recent Fifth Amendment decisions, *Smoke Rise* offers a likely paradigm for federal and state court review of the Bill. However, as a cautionary note, and as evidence of the fact-driven nature of takings jurisprudence, we note the result in *Q.C. Construction Company v. Gallo*, 649 F. Supp 1331 D.R.I. 1986). In that case, a town council enacted, by resolution, a residential building moratorium because the town's sewer system was taxed beyond its capacity. The court struck down the moratorium, finding that it effected a taking of the plaintiff's property and was not "reasonably necessary" to a valid public purpose. *Id.* at 1336. The court reasoned that the moratorium only preserved "the already bad [sewer] situation" and did nothing to correct it. *Id.* The court noted that there were "less drastic" means available to the town to address the sewer failures. *Id.*

Conclusion

Although the Bill does not describe the public interest that it is intended to protect, we assume that a valid public purpose can be articulated and that the Bill furthers that purpose. If so, the Bill is sustainable. The "moratorium" proposed by the Bill is temporary; indeed, as to some applicants for a building permit, the duration of the moratorium may be as short as 15 days. The Bill appears to be designed to ensure that permits for certain buildings are properly issued. If applied properly, the Bill seems unlikely to affect any vested rights; permits are suspended only if construction on the building has not yet begun. In sum, the Bill is a defensible exercise of the police power, though we do recommend that the Bill explicitly state the reasons for the "moratorium."

If you have any questions or concerns regarding this memorandum, please feel free to contact us.

cc: ✓ Michael Faden, Senior Legislative Council
Malcolm Spicer, Assistant County Attorney

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July 20, 2005

By Fax and Email

The Honorable Thomas E. Perez, President
and Members
Montgomery County Council
Stella B. Werner Council Office Building
6th Floor
100 Maryland Avenue
Rockville, MD 20850

Re: Expedited Bill No. 22-05 (the "Bill")
Concerning: Building Permits-Moratorium-Certain Areas

Dear Council President Perez and Members of the County Council:

This letter is intended to respectfully suggest potentially curative revisions to your proposed Bill, for purposes of clarifying both its proposed applicability and scope. Please note that because at least two (2) Council members will be absent for the upcoming public hearing on 7/26/05, we also respectfully urge that this legislation be tabled to consider pre-enactment revisions by the entire Council.

In the interim, some of our specific revision recommendations include:

1. Lines 11 through 13 currently propose that all already issued building permits will be suspended and stop work orders issued "if construction of that building has not actually started when this Act takes effect." While we appreciate the proposed grandfathering for already "started" construction, the apparent premise for denying all other permittees lawful use of their earlier issued permits is the *misplaced presumption* that because DPS and/or MNCPPC are allegedly under-staffed, an as-planned violation "must exist" in regard to all of those issued permits. That presumption is made, despite a complete lack of permit-specific evidence of any such as-planned (and permitted) violation in fact. Respectfully, that presumptive denial of those permittee rights smacks of an unconstitutional denial of due process in regard to

those permittee rights which will not stand the test of judicial challenge.¹
Accordingly, all already issued permits should be grandfathered, subject to the
permittee committing a (proved) violation in fact -- just has always been the case.²

¹ Because this type of *en masse* stop work order/moratorium is unprecedented in Maryland --particularly in regard to already issued permits -- we looked at case law from other jurisdictions for insight. One case which is on "all 4s" in rejecting the legality of this type of premature moratorium is New Jersey Shore Builders v. Township Committee, 191 N.J. Super. 627, 468 A.2d 742 (1983), wherein the New Jersey Court struck down similar legislation, stating in pertinent part:

It is not enough to support a moratorium ordinance to say that a problem exists and some residents are complaining. The situation must be exigent, the causes must be adequately explored and it must be demonstrated that other less extreme solutions have been investigated and found to be not feasible. None of these requisite proofs is before the court. Stripped to its essentials, the ordinance is nothing more than an expedient legislative reaction to citizens' complaints.

I therefore find that even if it is assumed that the power remains to adopt a moratorium of the type here involved, the ordinance before the court is an invalid exercise of that power.

² The proposed Bill fails to comply with the express County Code requirements for issuance of a stop work order. Specifically, such stop work orders would not be based on any determination by the director that work is being "prosecuted in violation" of Ch. 8 or Ch. 31. Moreover, the Bill proposes to require DPS to issue stop work orders on a wholesale basis with no site specific factual findings whatsoever. Such actions would not only violate the procedural due process mandate in Section 8-20 for factual determinations of "violations," but would also represent arbitrary and capricious agency action in direct contravention of U.S. and Maryland constitutional substantive due process guarantees. In essence, the stop work orders would presume, on no factual basis, that alleged height and setback violations in the Clarksburg Town Center may also exist (along with other possible violations) in other residential buildings throughout the County. To the contrary, having neither found nor even received any allegations of violations elsewhere, the presumption should be that the problems, if any, are limited to the Clarksburg Town Center. Indeed, Clarksburg is the only area in which allegations have been vetted before the Planning Board and, although the Board found violations to have occurred, it also grandfathered from the need for compliance all units that were built, under construction or under contract with third party purchasers.

The Section 8-20 provisions regarding threats to "safety, health and welfare of the public" are also inapplicable. The mere fact that concerns may have been raised in Clarksburg in no way suggests that such concerns are widespread or (even if they were) that they pose any form of public threat. *See* Planning Board's grandfathering action in Clarksburg. Absent any public threat in Clarksburg where violations were both alleged and found, it is inconceivable that public threats may be posed in the absence of any findings or allegations.

The Section 8-21 permit revocation and Section 8-22 violations provisions are equally inapposite. As to Sec. 8-21, there have been no allegations or findings of "false statement or misrepresentation of fact" to support any permit revocations. Section 8-22 violations require, as the title suggests, the occurrence of a violation from a law, regulation, plan, or permit. Once again, absent some site specific factual determination, no generic violation notices may be issued. Even language in Section 8-26(g) regarding compliance with zoning regulations regardless of issuance of permits is overreaching when no site specific zoning violations have been alleged. *Accord*, Section 8-13 "Regulations." Of course, Sec. 8-13(b) states:

"(b) The Director must hold at least one public hearing, after public notice, before recommending to the Executive regulations adopting standards and requirements for the construction, alteration, addition, repair, removal, demolition, use, location, occupancy, and maintenance of all buildings and structures, and their service equipment...."

2. Regardless of how you decide to address ¶1 above, the MNCPPC Planning Board granted all Clarksburg Town Center builders height and setback compliance grandfathering for all (already permitted through DPS) as-planned homes that were either built, under construction *or subject to outside contract with third party purchasers*. Clearly, and at a minimum, that already vetted and approved grandfathering should be carved out and expressly preserved in any revised Bill actually proposed for enactment.³
3. Lines 20 through 23 of the proposed Bill currently provide that verification of building plan conformance must be obtained from the Planning Board Chair and DPS Director. We recommend that this language be qualified to require confirmation regarding *only building height and setbacks* (i.e., the only specific concerns out of which the perceived need for the Bill arose).

Of course, it is also unrealistic to expect Messrs. Hubbard and/or Berlage to sign off on these issues personally, or that any such overly burdensome restriction will not create a bottleneck and, thus, *de facto* denial of new building starts until the proposed 11/1/05 sunset on your Bill. That apparently *unintended impact* should be avoided. Thus, at a minimum, the very capable Planning Board and DPS staff should be allowed to assist in avoiding that inevitable gridlock. Otherwise, your non-choice choice at ¶(b)(2) of the Bill creates a practical nullity, virtually guaranteeing undue prejudice to all of the groups negatively impacted, without any corresponding benefit to the County or its citizens. Alternatives might include newly applied DPS requirements (i) to include a complete set of architectural drawings clearly showing height, together with a representation and warrant from the applicant's engineers that the as-planned home will conform with any applicable height requirements, as properly measured under the zoning ordinance and/or (ii) to include an as-planned house footprint overlay showing it to fit within the as-approved/planned building envelope (defined by applicable setbacks and the schematic drawings of same on the site plan sheets -- already part of what is included with a building permit application) and a representation and warrant by the applicant's engineer that the as-planned structure will comply with all applicable setbacks. By making these changes, the Council will more correctly address the issues raised in Clarksburg (i.e. height and setbacks) without unnecessary damage and prejudice to lawful permittees, while adding an additional layer of required circumspection for new applicants that are both curative of the perceived issues, while not excessively punitive on the permit applicants or their customers and contractors.

4. The language in Bill ¶(b)(2) -- requiring a 15-day hiatus after DPS and MNCPPC have signed off on a given permit being in compliance (again, the focus of that should be limited to height and setback compliance, whether for new permits and/or the inherently suspect *en masse* stop work order on already issued permits) -- improperly attempts to arrogate to the Council powers reposed exclusively in DPS (an executive agency of the County) and MNCPPC (a State agency). As such, the proposed bill

³ As the Council knows, on July 7, 2005, following a 10+ hour proceeding, the Planning Board unanimously voted to grandfather (for height and building setbacks) all Clarksburg Town Center residential units at issue which were either built, under construction or under contract as of 7/7/05. Thus, any such bill should not impede the already approved grandfathering or extend beyond the scope of those identified height and setback issues.

would encroach on established separations of power and, hence, exceed the Council's legislative authority. Moreover, it is unclear what purpose is to be served by the additional 15-day delay, particularly after the empowered agencies (County and State) have already spoken. For all of these reasons, that portion of the Bill should be deleted.

Bill 22-05 also overlooks the myriad of ancillary and costly/prejudicial impacts on third parties that it would cause. Examples of those costly impacts include prejudice to *bona fide* contract purchasers of new homes (including, but not limited to MPDU's) who will be forced to wait on housing starts/completions -- despite having posted deposits, paid loan application and appraisal costs (coupled with the unavailability of lengthy interest rate locks needed to preserve those home purchase opportunities during your proposed delays -- and incur extended interim/substitute housing costs. Those delays will also create school enrollment issues for those customers and their families. The proposed Bill also fails to contemplate the impacts on ancillary building industry participants (*e.g.* contractors who only get paid on a percentage completion basis, realtors who only get paid if and when closings on built homes have occurred, *etc.*).

While we appreciate the Council's stated desire to restore public confidence in the building permit process, these points make clear that the subject Bill, in its current form, is a legally untenable idea. Ground has been purchased in reliance on the existence of and availability of permits pursuant to already approved site plans. So too, outsale contracts with customers have been entered with existing and would-be County residents, not to mention the myriad of secondary and tertiary rippling/prejudice this Bill would cause to scores of working families in Montgomery County.⁴ Respectfully, the County's press release also grossly understates the number and type(s) of housing units and consumer outsale closings that will be impacted by the costly delays in building starts that the proposed Bill would unavoidably cause, whether intentionally or otherwise. Of course, each commercial permit could involve dozens of condominium units. Also, the numbers posted on the DPS website ignore the exponentially greater number of already issued permits that would be impacted by the blanket stop work order contemplated in ¶(a)(2) -- all without a shred of evidence of *any* violation in fact. The paid permit fees alone undoubtedly reach into the hundreds of thousands of dollars. So too, the number of permits that could expire in the interim, forcing applicants to pay impact fees that were earlier grandfathered as to those lawfully issued permits. At bottom, the actual number of housing starts (and, thus, completions) delayed by the proposed stop work on already issued

⁴ Another line of judicial decision the Council should keep in mind is Permanent Financial and its progeny. 308 Md. 239, 247-50, 518 A.2d 123, 128-129 (1986). Of course, that case stands for the proposition that when an agency issues a building permit and the lawful permittee takes action in reliance on it, the government is estopped to interfere with that lawfully permitted work, absent a government showing that the project approvals underlying the permit clearly prohibited the construction. In short, if the *ab initio* approvals made the applicability, *vel non*, of an alleged restriction ambiguous, then the fully disclosed as-planned construction application to the permitting agency and action taken in reliance on the issuance of the permit, estop the government from shutting down the permitted construction. Also, the permit agency's course of dealing with the applicant, approval of the proposed and fully disclosed construction equitably estops the government from reversing that permit approval. *Id.* Certainly, in the case of your proposed Bill at ¶(a)(2) -- an *en masse* stop work on all permits without *any* permit-specific evidence of violation -- the level of inherent and costly prejudice to several layers of reliance victims is an even more compelling reason for the Council *not* to impose that misplaced and, indeed (we believe), unlawful stop work order as to previously issued permits across the board.

permits and moratorium on new permits, correctly counted, will impact thousands of residential housing units (MPDUs inclusive) and the thousands of County residents who have contracted to purchase them. Unless and until those *real* impacts are considered, it is inconceivable that any notion of "good government" can coexist with the proposed Bill.

For all of these reasons, we respectfully request that the Council indefinitely table the proposed Bill until it can be more narrowly cast, consistent with the law and in a way that more directly addresses the Council's stated concerns, whether as suggested in this letter or otherwise. Thank you for your time in consideration of these suggestions. Should you or any of your fellow Council members wish to further discuss the merits of the foregoing, please feel free to contact us directly.

Yours very truly and respectfully,

SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

By: Kevin Kennedy (79)
Kevin P. Kennedy

By: Timothy Dugan (79)
Timothy Dugan

By: Larry Gordon
Larry A. Gordon

Cc: Michael E. Faden, Esq.
The Honorable George Leventhal, Vice President
The Honorable Phil Andrews
The Honorable Howard A. Denis
The Honorable Nancy M. Floreen
The Honorable Michael Knapp
The Honorable Marilyn J. Praisner
The Honorable Steven Silverman
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DAVID W. BROWN

July 21, 2005

Thomas Perez, President
Montgomery County Council
100 Maryland Avenue, Room 501
Rockville, MD 20850

RE: **Expedited Bill No. 22-05**

Dear Mr. Perez:

Enclosed is a document entitled "Clarksburg Town Center Advisory Committee Proposed Amendments to Expedited Bill No. 22-05." Our proposed revisions to Bill No. 22-05, and the rationale for them, can be summarized as follows:

Residential Construction The bill is limited to residential construction. The concerns animating the bill arose due to residential construction, but are just as applicable to non-residential construction. Hence, the Committee recommends elimination of this limitation.

Moratorium Coverage The bill is worded such that every project potentially subject to the moratorium can escape it by merely clearing a bit of ground in order to claim that "construction" has started. This loophole is closed by requiring the project to be far enough along that the foundation has been – or is being – laid.

Building Permit Approvals One of the purposes of the bill is to "generally amend County law governing the issuance and use of building permits." The bill is therefore an opportune time to remedy the serious gap that has been exposed in site plan enforcement at the building permit stage. A new proposed section 2 accomplishes this. It provides that the Board (or its staff) will first determine site plan compliance for the building subject to the requested permit and provide DPS the information necessary for its own independent determination thereafter. This "belt and suspenders" approach should ensure an end to the current problems so evident in the Clarksburg permitting process.

Whether and to what extent the building permit application information requirements (§8-24 of the Code) might need some fine-tuning is an issue on which we defer to DPS, who perhaps might be consulted before next Tuesday by your staff. If that

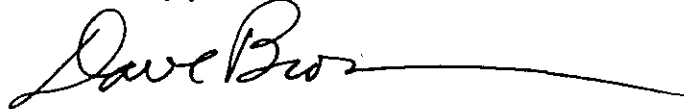
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Thomas Perez, President
July 21, 2005
Page 2

is not practicable, these adjustments, if any are necessary, plainly have less urgency than ensuring that someone is minding the store on ongoing permitting activity.

We appreciate your consideration of these proposals. Please call if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dave Brown", followed by a long horizontal line extending to the right.

David W. Brown

/enclosures

cc: All Members of the County Council
Clarksburg Town Center Advisory Committee

CLARKSBURG TOWN CENTER ADVISORY COMMITTEE
PROPOSED AMENDMENTS TO EXPEDITED BILL NO. 22-05

1. Section 1 is Amended as follows:

In subparagraph (a)(1), omit the word "residential"

In subparagraph (a)(2), omit the word "residential"

In subparagraph (a)(2), replace the words "construction of" with "the pouring or other erection of the permanent foundation structure for"

In subparagraph (b), replace "This Act" with "Section 1 of this Act"

In subparagraph (b)(2), omit the word "residential"

2. Section 2 is Renumbered Section 3.
3. The following new Section 2 is added:

Section 2.

Section 8-25 of the Montgomery County Code is amended as follows:

Subparagraphs (b) – (h) are redesignated as (c) – (i), and a new subparagraph (b) is added to read as follows:

- (b) Additional requirements for lots subject to an approved site plan. If the building permit is for construction on a lot for which development is subject to an approved site plan under §59-D-3, the Director may not issue the permit without receipt of a signed certification from the Planning Board or its designee of (1) the applicable development standards for the lot and any improvements thereon, taking account of all the requirements of the site plan, and (2) its determination that the construction proposed by the permit conforms with those standards. Following such receipt, the Director shall independently examine and determine compliance with the standards so certified, in addition to the requirements set forth in subparagraph (a).

MEMORANDUM

July 21, 2005

TO: Councilmembers

FROM: Thomas E. Perez, Council President

SUBJECT: July 26 Briefing by the Planning Board and DPS

The Planning Board and Department of Permitting Services are scheduled to brief the Council at 11:20 a.m. on July 26, before the public hearing is held later in the afternoon on Bill 22-05, on the status of their development review processes in light of the problems in Clarksburg that have been brought to our attention. Based on the many questions raised so far by Councilmembers, I am concerned that this briefing could easily take the entire day if we do not precisely define what we want to cover.

I recognize that everyone wants to know exactly what happened in Clarksburg and why, and whether similar violations of approved plans are common in other developments already built or under construction elsewhere in the County. Previous events can be reviewed in detail after the Council receives the OLO report to us and the assessment being prepared by the Planning Board and DPS of building permit conformance with site plans approved in the last two years. Now we are concerned that extensive additional violations must not be allowed to occur before OLO and others complete their studies and any recommended changes to the development process are implemented.

On July 26 we should focus on both agencies' current strategies to deal with pending developments. The purpose of this briefing is to learn in greater detail precisely what steps the Planning Board and DPS are taking to ensure that there are no additional violations taking place in Clarksburg and elsewhere. This will give us necessary background information to consider the pending bill restricting the issuance of residential building permits and the more limited administrative building permit review that the County Executive and Planning Board Chair announced on July 18, without attempting to cover all the broader issues that we will begin to address in a few weeks.

The questions I have asked the two agencies to address on July 26 are:

1. What steps are you currently taking during the review of building permits to assure that zoning development standards are being checked before a building permit is issued?
2. How many pending or approved building permits, site plans, and site plan amendments are affected by actions you have already taken? (Provide a map or indicate locations if possible.) How many are residential and how many are commercial buildings? How many additional residential projects would be affected by Bill 22-05? Can you estimate how long the process required by Bill 22-05 would delay a typical building permit, or if that is not possible what range of time delays are likely?
3. We would like an initial status report on the Planning Board's and DPS' two-year review of site plans and building permits. Has this review begun? How will it be conducted? How many staff are working on it? How many site plans are affected? How many have you inspected, and what are the results of your initial inspections? How long do you think this review will take? What difficulties do you foresee in completing this review? What if any actions will result from any deviations from approved plans that you find during this review?
4. What staffing changes are necessary for each agency to assure proper review of building permits for conformance with approved development plans? Do you intend to reassign or bring in part-time staff to address this current crisis? Given what you know about the extent of the problem today, do you see a need for an increase in permanent staff as well? If more permanent staff are needed, what is the estimated impact on relevant permitting and development fees?

We will have ample time in September and beyond to address the critical questions of what went wrong, why, and how we fix the problems and restore public confidence in the integrity of the development review and implementation process.



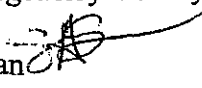
MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

STEVEN A. SILVERMAN
COUNCILMEMBER

MEMORANDUM

July 19, 2005

To: Douglas M. Duncan, County Executive
Derick Berlage, Chairman, Montgomery County Planning Board

From: Councilmember Steven Silverman 
Chairman, Planning, Housing, and Economic Development Committee

Subject: Freeze on Building Permits

It is imperative that our residents have confidence in the County's land use approval processes and all of us are committed to taking the steps necessary to restore that confidence. I support the steps you have just taken to freeze building permits in site plan zones until height and setback requirements for homes can be verified.

At the same time, we need to act quickly so that families with contracts to purchase homes will not face weeks and months of uncertainty as to when they will be able to move into their home. We know this can wreak havoc on families' plans, and in many cases result in real financial hardships, particularly for those moving into affordable housing under our MPDU program.

As you know, next Tuesday, July 26, the Council will consider legislation to preclude the issuance of building permits for homes for which a site plan is required and issue stop work orders on certain building permits previously issued. As proposed, this legislation expires on November 1, or with respect to any residential building for which a site plan is required, 15 days after the Council receives certification from the Chair of the Planning Board and Director of Permitting Services that plans for the building conform to all applicable prior land use approvals.

As part of the Council's discussion of this legislation, I believe we need the following written information:

1. a clear understanding regarding the specific steps you are planning to take to implement a new building permit approval process and, most importantly, how long it will take you to implement that and begin issuing permits;

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2. what additional staff you will require, how long it will take to hire that staff, and what interim staffing plans you will undertake to accomplish the work before the additional staff is hired;
3. how your plans differ from the proposed legislation the Council will consider, and with respect to the proposed legislation, what specific steps you would take to implement it and how long it would take to comply with the provisions requiring joint certification by the Planning Board Chair and DPS Director.
4. are there MPDUs affected by your building permit freeze or the proposed legislation.

I believe it is essential that the Council, affected new home buyers, and the public have a clear understanding of the steps you will take and a specific timeline for ensuring that new homes meet height, setback, and other conditions of site plans.

Together we will take the actions needed to improve our land use approval, oversight, and enforcement processes. I know we are all committed to that task.

cc: Councilmembers
Mike Faden




MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MICHAEL KNAPP

MEMORANDUM

July 20, 2005

To: Bruce Romer, CAO

From: Councilmember Michael J. Knapp 

Subject: Building Permits

Having read the press release on Monday which states that there is a freeze on the issuance of building permits in site plan zones which would currently effect more than 190 permits, and having been informed by members of the building industry that they have been provided language that they must now include on site plans submitted with building permit applications, I would like to request the following information be provided as soon as possible for the Council's review prior to the briefing at the Council on Tuesday.

- 1) A list of the permits that are pending including the location, whether the permit is for a residential or commercial structure, the number of units the permit covers (if residential), and the structure for which a permit is requested (new structure, addition to existing structure, etc.);
- 2) A copy of any instructions to DPS staff as to how the permitting process would change as of Monday, July 18, and how they were to implement the building permit freeze;
- 3) A copy of the letter being sent to building permit applicant notifying them that their permits will not be issues until they resubmit site plans that disclose height and setback calculations, and any other communication sent to builders explaining how they can comply with the new permit approval requirements.

Thank you in advance for your cooperation and assistance.

CC: Councilmembers
Mike Faden
Marlene Michaelson

MEMORANDUM

July 12, 2005

TO: Councilmembers

FROM: Marilyn Praisner

SUBJECT: Clarksburg



I have seen both the press release regarding the Council's statement and plan of action on Clarksburg and the County Executive's statement. I do not believe they go far enough.

We should not be asking the Planning Board and Department of Permitting Services to review site plans within the last two years. This work should be done independent of the entities responsible for supervising the process. Even 60 days is too long to wait for these answers. We can, and should, issue an RFP for a contract as soon as possible to perform this work. And I agree with the County Executive's recommendation for a moratorium on floating zones until we can understand the scope of the problem.

While additional staff may be helpful, we need to know how we will ensure that existing staff and future staff will perform the required tasks. I recommend on-site, dedicated inspectors for our larger construction sites and they should be added now. I believe that developer fees should provide the source of funding.

I want to know what is meant by "heightened scrutiny" and how we will know it is achieving the expected results. In other words what do the Planning Board and Department of Permitting Services plan to do to "ensure" work "being done" is consistent with approved plans? What about work that is completed? What is the statute of limitation?

If development in Clarksburg has already exceeded the maximum number of units that were to trigger Planning Board action, why has the Planning Board not taken action on this issue?

I understand members of the County's delegation who represent this area have been briefed by the Planning Board. If this is correct, why hasn't the Council received a briefing? What were the Delegates and Senators told? What was their response?



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MICHAEL KNAPP

MEMORANDUM

July 22, 2005

To: Councilmembers

From: Councilmember Michael Knapp 

Subject: Bill 22-05

As you are aware, I cannot be in attendance at our Council session on Tuesday, July 26 to address the issues of review and certification of site plans and building permits. In my absence, I wanted to provide this memo that outlines the issues I believe need to be addressed and refined within this legislation of which I am a cosponsor.

First, I would like to re-iterate my intent for this legislation. Over the past year, I have been working with the community to address many issues within Clarksburg – starting first with the destruction of local roads because of truck hauling traffic and then progressing to the planning and enforcement issues that we now have before us. At this point, now that the provision of Fire and Rescue service has been addressed, my single greatest concern of all the issues that exist is the credibility of Montgomery County's planning process, and most specifically the implementation and enforcement of that process. The Planning Board, the County Council and most importantly, the residents of our communities spend an amazing amount of time participating in the development of our Master Plans with the expectation that these plans will guide what ultimately is placed on the ground. There is now a perception as a result of the issues in Clarksburg, that what is in the Master Plan is not being followed, and as a result that these issues may not be confined just to Clarksburg.

I think we have a strong planning process with a good track record, but I am concerned that information isn't readily available that allows the Planning Board and the County Council to quickly confirm for all residents that the Clarksburg situation is an anomaly. So the intent of Bill 22-05, from my perspective, is to take a step back and have the agencies involved verify and confirm for the Council that Clarksburg is an isolated situation.

In order to accomplish this task, I believe we need to halt the issuance of building permits in more complex developments in which a site plan would be required, until the documents which govern those permits have been reviewed for conformity and internal consistency with applicable planning documents, and compliance with applicable zoning regulations. This should not be a lengthy process, and each site plan should be reviewed on a case-by-case basis. Once the records are found to be in compliance, the Chairman of the Planning Board will sign off that he finds all records to be in compliance, sends a memo to the Department of Permitting Services and the County Council to that effect, then the building permits for that plan can move forward.

I believe the responsibility for the review of these documents should rest with the organizations with the expertise to undertake such tasks. I particularly hope that we can eliminate any confusion regarding which entity is responsible for any part of the process. So, as is currently proposed in the legislation that I believe that both the Chair of the Planning Board and the Director of the Department of Permitting Services should sign off on each of their organization's efforts thereby eliminating any issues falling through the cracks.

It is important that we also consider how this process could unduly burden many homeowners or prospective homeowners (many of whom I have met with in the Clarksburg community) if it is inordinately long in duration. My staff has been in touch with Park and Planning staff to come up with some data criteria to help assess this impact. I anticipate the following information will be provided by Park and Planning in cooperation with the Department of Permitting Services:

- A list of active developments for which site plans are required
- A rough map showing where these developments are located in the County
- The number of residential building permits have been issued in each of these developments and for how many units (i.e. only 1 permit is issued for a multifamily building, so, multiple homeowners may be involved)
- The number of units under construction
- The number of units that have received a Use and Occupancy Permit or passed the final electrical inspection

I urge my colleagues to make every effort to review this impact data and hold harmless those residents who could withstand financial losses as a result of this action.

Neither the Council, nor the Council staff has the ability or capacity to provide in-depth review of site plans and building permits. In addition, there is a 30 day public review period upon the issuance of any building permits. So, I would suggest that it be sufficient for the Council to receive the individual confirmations for each site plan and that the 15 day period identified in the legislation be eliminated.

I appreciate the actions undertaken by the County Executive and Chairman Berlage in their effort to assure compliance within the implementation of the planning process.

However, I think their efforts to look only at height and setback requirements only reacts to the initial issues identified within Clarksburg and does not recognize the need to review the planning documents not only in Clarksburg but in other more complex residential projects. As you may be aware, there are still a number of outstanding allegations identified by the residents of Clarksburg that are pending review by the Planning Board. I certainly would not want the County to proceed with the significant step of freezing the issuance of building permits only to review a limited set of issues and potentially miss other elements of compliance that could have easily been identified in this process. For this reason, I believe that the review called for in this legislation must occur.

Finally, I am fearful that the credibility of the County's development review and enforcement processes erode a little further with each day that there is not confirmation that other site plans have been reviewed and are in compliance and I would urge all County departments and agencies working in this effort to move with all deliberate speed to conduct thorough reviews as quickly as possible.